UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EAST END ERUV ASSOCIATION, INC., MARVIN TENZER, MORRIS TUCHMAN, CLINTON GREENBAUM, ALAN H. SCHECHTER and CAROL SCHECHTER,

CV 11-0213 (LDW)(ETB)

Plaintiff,

-against-

THE VILLAGE OF WESTHAMPTON BEACH, CONRAD TALLER, individually and in his official Capacity as Mayor of the Village of Westhampton Beach, TONI-JO BIRK, LEOLA FARRELL, JOAN S. LEVAN, HANK TUCKER, each individually and in their official capacities as Trustees of the Village of Westhampton Beach, THE VILLAGE OF QUOGUE, PETER SARTORIUS, individually and in his official capacity as Mayor of the Village of Quogue, RANDY CARDO, JEANETTE OBSER, KIMBERLY PAYNE, and TED NECARSULMER, each individually and in their official capacities as Trustees of the Village of Quogue, THE TOWN OF SOUTHAMPTON, ANNA THRONE-HOLST, Individually and in her official capacity as Supervisor of the Town of Southampton, NANCY S. GRABOSKI, CHRISTOPHER R. NUZZI, JAMES W. MALONE, BRIDGET FLEMING, each individually and in their official capacities as member of the Town Council of the Town of Southampton,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF WESTHAMPTON BEACH DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants Village of Westhampton Beach ("Westhampton" or "Westhampton Beach"), Conrad Teller, Toni-JoBirk, Leola Farrell, Joan S. Levan, and Hank Tucker (collectively, the "Westhampton defendants") submit this memorandum of law in support of their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

According to plaintiffs, they wish to establish an eruv, defined as a symbolic border around a geographical area, the designation of which allows observant Jews to push and carry objects on the Sabbath and Yom Kippur that Jewish law otherwise prohibits. Having determined that no law prohibits plaintiffs from establishing the eruv, plaintiff East End Eruv Association ("EEEA") entered into private agreements with Verizon and LIPA by which the public utilities tentatively agreed to allow EEEA to place wooden staves, called "lechis," onto their utility poles for the purpose of establishing the "eruv." Despite being certain that no law prohibited these lechis, EEEA made its agreements contingent on the legality of their affixation to the utility poles. Now, plaintiffs come before the Court essentially seeking free legal advice on the legality of the lechis and, thus, the validity of their agreement.

This Court lacks subject matter jurisdiction over plaintiffs' claim because plaintiffs fail to present a justiciable Article III case and controversy. Plaintiffs lack standing to sue the Village because their alleged injuries are not fairly traceable to the Westhampton defendants, who <u>have taken no action affecting plaintiffs or their efforts to build and eruv</u>. This lack of official action by defendants means that plaintiffs' claims are conjectural and hypothetical and, therefore, unripe for judicial review. Any decision on the matter would be an advisory opinion in contravention of the Constitution's "case and controversy" requirement.

Even if this matter were justiciable, plaintiffs have not pleaded, and cannot show, that either Westhampton Beach or the individual defendants had any involvement in any violation of plaintiffs' constitutional rights. Their 42 U.S.C. § 1983 claims, therefore, fail at the outset.

Plaintiffs' First Amendment free exercise claim fails, as well, because plaintiffs cannot show that any Westhampton Beach action has substantially burdened their ability to practice their religion. Plaintiffs remain as free as ever to comply with the strictures of Jewish religious law, which prohibit carrying and pushing objects outside the home on the Sabbath. While plaintiffs' inability to circumvent these religious restrictions might burden some secular activities (such as carrying tissues or visiting friends), it has no impact on religious ones.

Plaintiffs cannot state a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") because they lack a property interest in the utility poles they seek to use.

The conspiracy claim fails because plaintiffs have not pleaded facts sufficient to sustain a conspiracy claim. To the extent that the alleged conspiracy depends on agreement among the Westhampton Beach defendants, such a claim is barred by the intra-corporate conspiracy doctrine.

Finally, plaintiffs' state law claim for tortious interference with contract fails because plaintiffs did not have a valid and enforceable contract with Verizon and LIPA, because the Westhampton Beach defendants took no action to procure a breach, and because plaintiffs have failed to file a notice of claim pursuant to the General Municipal Law.

STATEMENT OF FACTS

PLAINTIFFS WOULD LIKE AN ERUV

Plaintiffs wish to establish an eruv, a symbolic boundary that allows observant Jews within the boundary to carry or push objects from place to place within the boundary on the Sabbath and Yom Kippur, activity that they believe is otherwise (without an eruv) prohibited by Jewish religious law. See Complaint, ¶ 35.

There are two requirements under Jewish law in order for an eruv to be valid: (a) a proclamation delineating and "renting" the area for use as an eruv from a public official whose jurisdiction includes the area in the which the eruv is to be constructed; and (b) the physical construction of the eruv must comply with the requirements of Jewish law. Id., Ex. K, p. 3. If either of these requirements is not met, the eruv cannot be valid. Id.

One way plaintiffs allege the eruv is to use existing telephone and utility poles and wires and attach 40" wooden staves called "lechis" to the poles. Id., ¶ 34. Plaintiffs' complaint does not outline the other possible ways to create an eruv (or how they were created before electricity or telephones) or whether they have attempted to create an eruv in any of these other ways.

In March, 2008, the Hampton Synagogue, which is not a party to this case, filed with Village of Westhampton Beach a highly publicized petition to create an eruv. Id., ¶ 39. The Synagogue *voluntarily withdrew* its petition. Neither plaintiffs here nor anyone else has ever submitted anything further to the Village seeking official action on an eruv. Id., ¶ 42.[1]

Since that time, plaintiffs say, they conducted legal research, which told them that no local, county, or state law would prohibit the construction of an Eruv in Westhampton Beach and

[1] As a result of elections, the present Village Board differs from the Village Board in 2008. Leola Farrell was elected to the Village Board in 2010.

parts of Quogue and Southampton. Id., ¶ 48. Plaintiffs did not consult defendant Village of Westhampton Beach in this regard, and the Village provided no input on the matter.

Armed with their legal conclusion, plaintiffs entered private contracts with Verizon and LIPA. Id., ¶ 47.

PLAINTIFFS ENTERED INTO AN AGREEMENT WITH LIPA AND VERIZON

Sometime during May, 2010, EEEA allegedly entered into an agreement with Verizon by which Verizon agreed to permit the placement of "lechi" staves on its poles in the Village or Town of Southampton, Westhampton, Westhampton Beach and Quogue. See Complaint ¶ 17, Ex. F (Verizon Agreement)).[2] The Verizon agreement allows the placement of lechis on its poles only "to the extent that it may be lawful to do so." See Complaint, Ex. F). The agreement does not enumerate or locate the poles involved, does not mention a time frame, does not mention consideration by the EEEA, and does not contain a penalty for Verizon's failure to comply.

On July 27, 2010, EEEA entered into an agreement with LIPA, whereby LIPA would permit the EEEA to place and maintain pole attachments in the LIPA service area in Nassau, Suffolk, and Queens. See Complaint, Ex. G (LIPA Licensing Agreement). Under the agreement, LIPA has the unlimited right in its sole discretion to refuse a license to the EEEA for any attachment. Id., at Section 3. Additionally, the agreement provides, "with respect to any poles to which the [LIPA] may grant licenses only with the consent of a third party which has interest in such poles, the licensor shall use reasonable efforts to obtain such consent. [LIPA] may refuse to grant licenses to the [EEEA] unless the [EEEA] shall reimburse [LIPA] for any expense of payment incurred or made by the [LIPA] in order to obtain such consent." Id., at

[2] The agreement plaintiffs annex to the complaint is unexecuted by Verizon.

Article II, Section 6. Last, the agreement allows for termination by LIPA without notice to the EEEA when any governmental authority notifies LIPA that continuation of the agreement violates a governmental law, regulation, code, rule, ordinance, or order. Id., at Article VIII, Section 4.

The LIPA agreement, like the Verizon agreement, fails to specify the location or even number of poles to be used, the time for performance, and the compensation that LIPA will receive for allowing these attachments to their poles for private purpose.

Neither the agreements nor plaintiffs' complaint depicts, verbally or graphically, exactly where the eruv will be.

SOME VILLAGE OF WESTHAMPTON BEACH TRUSTEES WRITE LETTER CONFIRMING VERIZON'S POSITION

While individual Westhampton Beach defendants have made statements on the eruv issue, Complaint, ¶¶ 57-63, the Village has not done anything concerning plaintiffs' present desire to establish eruv in the Village. The Village has not passed any laws concerning eruvim,[3] and has not fined, prosecuted, or threatened plaintiffs, Verizon, or LIPA. Simply put, the Village has done nothing.

To create a case, plaintiffs deliberately distort beyond reality a May 18, 2009 letter from the Village to Verizon. First, the letter relates to a different eruv to be established by a different entity. Second, the letter is signed by four trustees, two of whom (Joan Levan and James Kemetler) are not on the Board any more. The letter is copied to Mayor Conrad Teller and then-Village Attorney Herman Bishop, neither of whom signed the letter.

Substantively, plaintiffs warp the letter into one conveying "the insupportable position that village approval was necessary for the establishment of the Eruv." Complaint, ¶ 53. In fact,

[3] On information and belief, the Hebrew plural for eruv is *eruvim*.

the letter merely states that "[i]t's the Board's understanding" that Verizon is in talks with EEEA, and that "[t]he Board further understands Verizon's position to be that it will not execute the proposed agreement… unless and until the Village approves the attachments." Id. (emphasis supplied). An honest examination of the letter the Village shows that the Village (in that letter or elsewhere) gave no official position or opinion on the EEEA-Verizon/LIPA agreements. The letter by members of the previous Board was in response to a letter Verizon sent in response to a letter to Verizon by a private, non-municipal entity.

VERIZON AND LIPA HAVE NOT COMPLIED WITH THE ERUV AGREEMENTS

Plaintiffs do not allege that they have complied with any of the application procedures set for in their agreements with Verizon and LIPA, or that they have taken any others steps to procure actual binding licenses from Verizon and LIPA for the construction of lechis. Not surprisingly, then, Verizon and LIPA have not issued the licenses plaintiffs claim to seek. Complaint, ¶¶ 131-32.

ARGUMENT

POINT I

PLAINTIFFS FAIL TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY, DEPRIVING THIS COURT OF SUBJECT MATTER JURISDICTION OVER THIS SUIT

A. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIMS AS THEY HAVE NOT SUFFERED ANY INJURY THAT IS FAIRLY TRACEABLE TO DEFENDANTS THAT IS REDRESSABLE BY A FAVORABLE OPINION

Plaintiffs lack standing to maintain their claims against defendant Village of Westhampton Beach because they have not suffered an injury that is fairly traceable to the Village.

The question of standing is the "threshold question in every federal case, determining the power of the court to entertain the suit." Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 39 (1976). To satisfy the constitutional requirements for "standing" at this stage, the plaintiff must allege that (1) he personally has suffered "injury-in-fact," an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury fairly can be traced to the challenged action ("causation"); and (3) the injury is likely to be redressed by a favorable decision ("redressability"). Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Valley Forge Christian College v. Ams. United for Separation of Church and State Inc., 454 U.S. 464, 477 (1982); Innovative Health Systems, Inc. v. City of White Plains, 931 F.Supp. 222, 235 (S.D.N.Y. 1996). If any of these three elements is not satisfied for a claim, the Court must dismiss it. See Daimler Chrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006); Bennett v. Spear, 520 U.S. 154, 167 (1997).

For Article III standing, there must be a causal connection between the injury and the conduct complained of. Lujan, 504 U.S. at 560-61. In other words, the injury must be "fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court." Id. (citing Simon, 426 U.S. 26, 41-42 (1976)).

Here, plaintiffs allege that Westhampton defendants did two things in "opposition" to the lechis: (1) Westhampton wrote a letter to Verizon summarizing the Village's understanding of *Verizon's position* on the lechis, and (2) individuals in the Village made public statements either disapproving of the eruv or recognizing voter disapproval of it. Neither the letter nor the public statements constitute any official action on plaintiffs' plan to build an eruv or agreements with LIPA and Verizon. The Westhampton defendants have neither required nor prohibited any conduct on the part of plaintiffs, Verizon, or LIPA. They have not prosecuted or threatened prosecution; they have not fined or threatened to fine. Having taken no action whatsoever with regard to these parties, Westhampton defendants could not possibly have injured them. Even if plaintiffs have been injured in some way, their injuries are not fairly traced to defendants.

Plaintiffs attempt to conjure a controversy from the Village's May 19, 2009 letter to Verizon. Even a cursory reading of the letter reveals shows the Village took no action. The letter merely relates "the Board's *understand[ing of] Verizon's position*" that "[*Verizon*] will not execute the proposed agreement, and will not take or permit any action… unless and until the Village approves the attachments." Complaint, Ex. H.[4] If the Westhampton defendants actually had taken some concrete steps in opposition to plaintiffs' plans, plaintiffs would not have to resort to this interpretive sleight of hand to manufacture controversy.

[4] Notably, the May 18, 2009 letter from WHB to Balcerski came one year before Verizon's first agreement with EEEA. Compl. Ex. F [Verizon Agreement]; Ex. H [May 18, 2009 Letter]. Thus, Verizon was willing to enter into an eruv agreement even after it received WHB Trustees' letter.

The public and campaign statements allegedly made by Village officials that plaintiffs cite are protected by the same First Amendment that plaintiffs invoke; they cannot give rise to liability. See X-Men Sec., Inc. v. Pataki, 196 F.3d 56 (2d Cir. 1999); Hammerhead Enterprises, Inc. v. Brezenoff, 707 F.2d 33 (2d Cir. 1983) (government official did not violate First Amendment rights of creators of board game satirizing public assistance programs when he wrote directly to stores urging them to refrain from carrying the game)[5]. In any event, such alleged statements are no substitute for the official action that plaintiffs both need to succeed and cannot find.

Nor can these statements constitute "Village opposition" to the eruv; under New York state law, "[o]ne of several trustees has no authority to speak for or to bind [a] municipality…." Hungerford v. Village of Waverly, 125 App.Div. 311, 109 N.Y.S.2d 438 (3d Dep't 1908) (dismissing an action against a village brought on the basis of individual statements of trustees).

What is more, the logical conclusion to plaintiffs' claims – that statements by Village residents and an informational letter from the Village to Verizon constitute opposition to the eruv – is that the First Amendment bars this Court from granting the injunctive relief plaintiffs seek. If, as plaintiffs claim, the WHB defendants have opposed the eruv by speaking against it, and plaintiffs seek to enjoin the defendants from opposing the eruv, then plaintiffs are asking this Court to issue an order enjoining the municipal and individual defendants from speaking. The First Amendment prohibits this kind of prior restraint on speech.[6] See Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 239 F.3d 172, 176 (2d Cir. 2001)

[5] Pursuant to this Second Circuit decision, even if defendants had called up Verizon and LIPA directly and urged them not to breach their purported agreements with EEEA, their speech would enjoy First Amendment protections.

[6] This further undercuts plaintiffs' claim to Article III standing as it means that plaintiffs' injuries are not redressable by this Court. See Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).

("prior restraints are the most serious and the least tolerable infringement on First Amendment rights.") (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976)).

To the extent that plaintiffs speculate that Westhampton defendants somehow *discouraged* Verizon and LIPA from following through with their agreement with plaintiff, such discouragement is insufficient to create standing. In Simon v. Eastern Ky. Welfare Rights Org., individual indigent plaintiffs who did not receive desired hospital services brought suit, not against the hospitals, but against treasury officials who allegedly passed regulations that "discouraged" hospitals from providing such services. Simon, 426 U.S. at 42. The Supreme Court held that plaintiffs lacked standing because "it was purely speculative whether denials of service specified in the complaint fairly can be traced to [defendants'] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." Id. at 42-3. The hospitals, the third parties to whom the injuries actually were fairly traceable, were not before the court.

Similarly, here, since Westhampton took no action with regard to EEEA's agreement with LIPA and Verizon, any injury is fairly traceable to only two entities: plaintiffs themselves, for entering into an illusory contract with Verizon and LIPA that allowed the two to refuse performance at their discretion, and Verizon and LIPA, for doing precisely that. A review of plaintiffs' only alleged injuries lays this point bare.

Plaintiffs here allege only the following "injury in fact" to EEEA: (1) losses incurred on "pole walks" in preparation for the establishment of the Eruv, (2) the procurement of an insurance policy as required under the contract; (3) the costs of negotiating with Verizon and LIPA over the agreements and (4) losses incurred by families who, when permitted, must hire

individuals to push their carriages, strollers or wheelchairs to synagogue on the Sabbath and Yom Kippur due to the absence of an Eruv. Complaint, ¶ 134.

The first three "injuries" are, in reality, the necessary costs and expenses incurred to establish the eruv, expenses that were incurred without regard to any alleged action by the Village, and which would have been incurred regardless of whether or not the Westhampton Beach took some action to oppose the eruv. As for the fourth injury - the alleged losses incurred by the families referred to in item (4) above, these are obviously not losses sustained by EEEA and cannot constitute the "injury in fact" required to demonstrate standing by EEEA in its own right. To the extent these "losses" may have been incurred by plaintiffs, these have been a consequence of plaintiffs' religious beliefs long before the EEEA and even the Village itself were formed. Plaintiffs have resided in the Village for years without an eruv, as Jews live all over the world without them; their sudden desire for one cannot convert what is otherwise simply a fact of life for observant Jews into an injury that is traceable to the Village.

Finally, plaintiffs' fourth alleged injury – the inability to push or carry things on the Sabbath absent an eruv – is not likely to be redressed by a favorable decision in this matter, as it does not appear that Verizon and LIPA have the authority to execute their respective agreements with plaintiffs. The utilities currently possess a franchise or privilege to erect and maintain their poles in the Village rights of way for the public purpose of delivering electricity and telephonic services to the residents of Westhampton Beach. New York Telephone Company v. Town of North Hempstead, 41 N.Y.2d 691, 698 (1977); Transportation Corporation Law §§ 11, 25 and 27 (McKinney, 1996, 2011). The utilities' privilege is akin to a license to perform certain acts upon the land without possessing an interest in it. Kohman v. Rochambeau Realty and Development Corp., 17 A.D.3d 151, 153 (1st Dep't 2005) (citing The Greenwood Lake and P.J.R. Co. v. The

New York & G.L.R. Co., 134 N.Y. 435, 440 (1892)). The Pub. Auth. and the Trans. Corp. Laws do not permit the utilities to create a sub-license for private use. Similarly, there is no case law permitting utility companies to turn over any portions of their public-land poles to private use. This Court should not skirt state law on plaintiffs' whim.

Finally, N.Y. Village Law § 6-602 provides that the streets and public grounds of a Village are "under the exclusive control and supervision of the board of trustees" of a village, and the N.Y. Attorney General has opined that a municipality may not "divert them to private use." See 1953 N.Y. Op. (Inf.) 35, 1953 N.Y. AG LEXIS 226 (A village may not permit the installation of a device on the sidewalk next to the curb adjoining a public street to permit bank deposits to be made without the necessity of the depositor leaving his automobile.).

B. PLAINTIFFS SEEK AN ADVISORY OPINION

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." Flast v.Cohen, 392 U.S. 83, 96 (1968). It is the very "core of Article III's limitation on federal judicial power." In re Nunez, 98-CV-7077 (CBA), 2000 WL 655983 (E.D.N.Y. Mar. 17, 2000). Under Article III, federal court jurisdiction is limited to actual cases and controversies; this excludes "advisory opinions." F.X. Maltz, Ltd. v. Morgenthau, 556 F.2d 123, 125 (2d Cir.1977).

Even under the Federal Declaratory Judgments Act, 28 U.S.C. § 2201, "The controversy must bed definite and concrete, touching the legal relations of parties having adverse legal interests." F.X. Maltz, Ltd., id. (citing Aetna Life Insurance Co. v. Haworth, et al., 300 U.S. 227, 240-41 (1937)). "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Id.

Since the Westhampton Beach defendants have not taken any steps to prevent plaintiffs, Verizon, or LIPA from placing lechis on poles in the Village, plaintiffs can present no live case or controversy for this Court. There is simply no real or substantial dispute between the Village and plaintiffs. F.X. Maltz, id. (absent more advanced "controversy" court lacked authority to evaluate constitutionality of statute under First Amendment); see also Olin Corp. v. Consol. Aluminum Corp., 5 F.3d 10, 17 (2d Cir. 1993) (overturning district court's ruling as an advisory opinion where dispute was only possible or hypothetical).

In the absence of a dispute, plaintiffs ask this Court to settle a hypothetical question: "*what if* the Village of Westhampton Beach officially objected to the building of an eruv or took some steps to prevent its building?" On the basis of this theoretical problem alone, plaintiffs ask the Court to issue injunctions and award damages.

Plaintiffs have come to federal court seeking free legal advice. EEEA voluntarily entered into two agreements to which the Village is not a party, both of which are effective only to the extent that they comply with applicable laws. Now, even while they claim to have already determined that no local, county, or state law or ordinance would prohibit the construction of an Eruv in Westhampton Beach, (Complaint ¶48), plaintiffs ask the Court to confirm it. If such suits were allowed, any two private parties could enter into a private agreement and run to District Court to find out if it is legal. This Court, absent action by Westhampton Beach, is not in-house counsel for EEEA, Verizon, or LIPA.

C. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR REVIEW

Plaintiffs' claims are not ripe for adjudication, as they depend on any number of assumptions and possible future events that may never take place. Courts have long recognized that Art. III requires that a controversy, as an initial matter, must be ripe. See Country View

Estates at Ridge, LLC v. Town of Brookhaven, et al, 452 F. Supp. 2d 142,148 (E.D.N.Y. 2006). Ripeness goes to the existence of a case or controversy, and thus presents a jurisdictional issue. See Met. Wash. Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 265 n. 13 (1991). Ripeness requires the court to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998).

Plaintiff's claims here rest entirely on speculation and conjecture. The Complaint does not include any information about where the lechis are to be placed and why. Must the lechis be placed on poles in the Village of Westhampton Beach or can they be constructed elsewhere? Can other landmarks or barriers be used in their stead? Are there other ways to establish an eruv? Plaintiffs' conduct in this litigation thus far underscores the mercurial nature of their claims; yes, apparently, the eruv may be constructed in any number of ways and locations. Since they filed the Complaint, plaintiffs have entered into at least two new agreements with Verizon and LIPA and have provided a number of different possible eruv configurations and lists of poll locations. Since the shape and construction of the eruv is subject to constant change, the Court is left to guess at the true need for the relief plaintiffs seek and the damages that might accrue if the relief is not granted.

Further, EEEA's "agreements" with Verizon and LIPA are contingent agreements to agree at a later time. They provide that plaintiffs *may*, at some later time, submit applications that outline precisely how and where plaintiffs propose to place lechis. Verizon and LIPA then have complete discretion to grant or deny the applications, and the agreements do not provide for

a penalty should Verizon and LIPA choose not to allow the lechis. Thus, even if the Court grants the relief plaintiffs seek, they may never be able to construct an eruv using the stave method.

Finally, it appears that Verizon and LIPA lack authority under state law to carry through with their agreements with the EEEA. The maintenance of telephone or light poles in a municipal street is a license or privilege, not the grant of an interest in real property or an appurtenance to real property. New York Telephone Company v. Town of North Hempstead, 41 N.Y.2d 691 (1977). See also New York Telephone Company v. City of Binghamton, 18 N.Y.2d 152, 272 N.Y.S.2d 359 (1966) and Matter of Consolidated Edison Co. v. Lindsay, 24 N.Y.2d 309, 300 N.Y.S.2d 321 (1969). A license is "a mere personal privilege to use another's property for a particular purpose." Bruce and Ely, The Law of Easements and Licenses in Land (1988) at § 10.01. As this Court recognized in denying plaintiffs' motion for a preliminary injunction, Verizon and LIPA are offering plaintiffs a sub-license. See November 3, 2011 Memorandum and Order, p. 23 ("the revocable "sub-licenses" offered by Verizon and LIPA to plaintiffs do not rise, as a matter of law, to an interest in real property.") Yet, absent an express grant of a power to assign, a licensor may not sublicense or assign its license. Maffetone v. Micari, 205 Misc. 459, 127 N.Y.S.2d 756 (Mun.Ct. 1954). Verizon and LIPA, thus, lack authority to sublicense the telephone poles to plaintiffs for a religious purpose.

Additionally, LIPA was created with authority to "save ratepayers money by controlling and reducing utility costs." Citizens for an Orderly Energy Policy v. Cuomo, 78 N.Y.2d 398, 414, 576 N.Y.S. 2d 185 (1991). It can only act within this authority; as the New York State Attorney General recently held, "As a creature of statute, LIPA lacks powers not granted to it by express or necessarily implicated legislative delegation." 2007 N.Y. Op. Att. Gen. 31 (internal citation omitted). The Attorney General went on to hold that there is "nothing in the Powers,

duties or purposes of LIPA that renders improving community goodwill or the well-being of the community unrelated to the provision of electrical service as part of LIPA's mission." Id. Since the attachment of plaintiffs' lechis is wholly unrelated to the provision of electrical services, it is entirely outside LIPA's purpose and authority. Thus, it appears that neither LIPA nor Verizon has the authority to grant the relief plaintiffs seek. In any event, this is an issue that should be resolved before this case can be ripe for federal judicial review.

Plaintiffs have presented this Court with only the vaguest notion of a dispute that may or may not someday turn into a ripe case or controversy. Their potential claims rest entirely on the future actions of a number of parties, including the Village of Westhampton Beach (which, again, has yet to take any official action on plaintiffs' application), Verizon, LIPA, the other defendants, and plaintiffs themselves. Under these circumstances, there is no way for the Court to weigh accurately plaintiffs' claims of potential liability, damages, and declaratory relief.

POINT II

PLAINTIFFS FAIL TO ALLEGE EITHER MUNICIPAL OR INDIVIDUAL INVOLVEMENT IN A CONSTITUTIONAL DEPRIVATION SUCH AS TO SUPPORT § 1983 LIABILITY

It is axiomatic that, to prove liability under 42 U.S.C. § 1983, plaintiff must prove the "personal involvement of defendants in alleged constitutional deprivations." Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 122 (2d Cir. 2004). In other words, plaintiff must prove that the "defendant actually caused the plaintiff to be deprived of a federal right." Id. (emphasis added).

To hold a municipality liable, a plaintiff must demonstrate both a constitutional violation and a sufficient causal nexus between the violation and a municipal policy or practice. Monell v.

Dep't of Soc. Services of the City of N.Y., 436 U.S. 658, 694 (1978); Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983). A plaintiff may demonstrate the existence of a policy in a number of ways. He may (a) allege a formal policy that was officially adopted by the municipality, Monell, 436 U.S. 658; (b) demonstrate the existence of a policy by showing that acts of a municipal agent were part of a widespread practice that, although not expressly authorized, constitutes a custom or usage of which a supervising policymaker must have been aware, City of St. Louis v. Praprotnick, 485 U.S. 112, 127 (1988); or (c) demonstrate that a municipality's failure to provide adequate training or supervision of its agents rising to the level of deliberate indifference. Brown v. Board of Comm'rs of Bryan County v. Brown, 520 U.S. 397, 407-08 (1997). Alternatively, he may bind the municipality through a single act of a final policymaking official. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986); Jeffes v. Barnes, 208 F.3d 49, 57 (2d Cir. 2000). If plaintiff is unable to establish either a policy or custom or a single act of a final policymaking official, municipal liability will not attach.

Here, plaintiffs have failed to identify any official act by the Village of Westhampton Beach or any of its final decision makers which has led to the alleged deprivation of plaintiff's First Amendment rights. This is unsurprising, given that the Village has not taken any such official action. Thus, the Village cannot be held liable under any theory of § 1983 liability, including a First Amendment Free Exercise Clause violation.

Without any actual action by the defendant Village, plaintiff will have to ask this Court to rule that the public statements of various Village officials have, somehow, run the Village itself and those officials afoul of the First Amendment. Plaintiffs allege that individual defendants Teller, Birk, Farrell, Levan, and Tucker have spoken out publicly in a variety of forums, expressing their or other residents' opinions regarding the eruv, a subject of popular concern.

(Complaint, ¶¶ 57-63). Far from violating the First Amendment, defendants' public statements are protected by it. See X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 68-9 (2d Cir. 1999). Having failed to allege any action that might have prevented plaintiffs from building an eruv or violated their First Amendment rights, plaintiffs cannot show any possibility of success on the merits on their § 1983 First Amendment claim.

POINT III

PLAINTIFFS CANNOT PROVE A FIRST AMENDMENT VIOLATION BECAUSE THE ABSENCE OF AN ERUV DOES NOT SUBSTANTIALLY BURDEN PLAINTIFFS' RIGHT TO PRACTICE THEIR RELIGION.

Even assuming, for the sake of argument, that Westhampton Beach defendants *had* taken some action to prevent the establishment of an eruv, plaintiffs cannot succeed on a Free Exercise claim against the Westhampton Beach defendants. To state a Free Exercise Clause claim, plaintiffs must show government action has imposed "a substantial burden on the observation of a central religious belief or practice." Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49, 79 (2d Cir. 2001). Plaintiffs cannot make this showing here.

Plaintiffs do not claim that, without an eruv, they are unable to observe the Sabbath or practice Judaism. On the contrary, it is the observance of the Sabbath and the practice of Judaism, not government action, that restricts plaintiffs' ability to carry or push objects on the Sabbath. What plaintiffs ask this Court to do is, in essence, to declare that plaintiffs have a First Amendment right to *circumvent* certain religious restrictions.

To the extent that plaintiffs' beliefs restrict their ability to perform certain tasks on the Sabbath (like pushing strollers and carrying keys), these tasks are all secular in nature. See American Civil Liberties Union of New Jersey v. City of Long Branch, 670 F. Supp. 1293, 1296

(D.N.J. 1987) ("The eruv merely permits them to participate in such secular activities as pushing a stroller or carrying a book while observing the Sabbath.") A restriction on such secular activity, even if it was imposed by government rather than plaintiffs' own religious beliefs, cannot implicate plaintiffs' rights to Freedom of Exercise.

Plaintiffs' own proffered "expert" "in the Jewish laws associated with the establishment and maintenance of eruvim," (Decl. of Rabbi Peretz Steinberg, ¶ 1) confirms that, at a maximum, the lack of an eruv deprives plaintiffs only of "enhancements" of Jewish observance, such as attending some celebratory and commemorative events that might happen to fall on the Sabbath. Id., at ¶ 6; see also Complaint, Ex. K, p. 2 ("ability to participate in communal prayer in the synagogue… is… a meaningful and significant enhancement…. The eruv also enables Jews to enhance their observance of the Sabbath by permitting them to mingle more freely with their neighbors…"). The loss of such enhancement (which, in any event, is caused by Jewish law, not by defendants) is a far cry from the "substantial burden" on the observation of a central religious belief or practice.

Rabbi Peretz Steinberg further admits that "an eruv may be established in a number of ways", "one of the most common" of which is to affix lechis to telephone poles or utility poles. (See Steinberg Declaration, paragraph 8). Thus, the manner suggested by the plaintiffs is not the only way an eruv can be established. A restriction on *one* way to build an eruv or plaintiffs' *preferred way*, even if such a restriction existed with respect to Westhampton Beach, would not impose a "substantial burden" because it leaves open alternative means of eruv-building.

The "burden" is all the lighter here, given that plaintiffs may hire non-Jewish individuals to push their strollers and wheelchairs, Compl. ¶ 36, thereby eliminating any impediment to the enhancement of their religious observance and social lives. While hiring a non-Jewish

babysitter, home-aid or stroller/wheelchair pusher may be inconvenient, it is not a substantial burden. "[A] substantial burden must place more than an inconvenience on religious exercise; a substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (internal quotations omitted). Again, any inconvenience plaintiffs may suffer result from Jewish religious laws, not defendants' actions. Accordingly, plaintiffs cannot establish the substantial burden necessary to state a Free Exercise claim.

POINT IV

PLAINTIFFS LACK THE NECESSARY PROPERTY INTEREST TO STATE AN RLUIPA CLAIM

As this Court has already ruled, plaintiffs cannot sustain an RLUIPA claim because they lack any protectable land use or real property interest in the attachment of lechi staves to Verizon and LIPA telephone poles.

RLUIPA prohibits government land use regulations that impose substantial burdens on religious exercise. Section 2000cc(a)(1) of RLUIPA provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution –
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.

Section 2000cc-5(5) specifically defines "land use regulation" as:

> a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property

> interest in the regulated land or a contract or option to acquire such an interest.

42 U.S.C. § 2000cc-5(5) (emphasis supplied). As this Court held in denying plaintiffs' motion for a preliminary injunction:

> Plaintiffs have not shown that they possess any "ownership, leasehold, easement, servitude, or other property interest" in land or "a contract or option to acquire such an interest." Indeed, Article II, Section 5 of the LIPA Agreement confirms that plaintiffs do not possess a property interest: "No use, regardless of its duration, of the LICENSOR'S poles under this Agreement shall create or vest in the LICENSEE any ownership or property right in said poles, but the LICENSEE'S rights therein shall remain a mere license." …. [T]he revocable "sub-licenses" offered by Verizon and LIPA to plaintiffs do not rise, as a matter of law, to an interest in real property.

November 3, 2011 Memorandum and Order, p. 23. With no property interest in the land, plaintiffs have no right to relief under RLUIPA.

POINT V

PLAINTIFFS HAVE NOT SUFFICIENTLY ALLEGED A CONSPIRACY CLAIM

In order to state a claim pursuant to 42 U.S.C. § 1985(3), a plaintiff must allege "(1) a conspiracy; (2) for the purpose of depriving the plaintiff of equal protection of the laws or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; and (4) that a person is thereby either injured in his person or property or deprived of any right of a citizen of the United States." Johnson v. City of New York, 669 F.Supp.2d 444 (S. D.N.Y. 2009)

First, as more fully set forth above, plaintiffs cannot prove a First Amendment violation. In the absence of this underlying claim, plaintiffs' conspiracy claim dies on the vine.

Second, plaintiffs have failed to allege, and cannot show, a set of facts sufficient to sustain a conspiracy claim. For instance, the complaint does not allege a meeting of the minds among the defendants, any specific communications by and among the defendants establishing any such meeting of the minds, or any other concerted activities or coordinated activities among them. The bare allegations contained in Paragraphs 119 and 120 of the complaint are precisely the "labels and conclusions" and "formulaic recitation of the elements of a cause of action" rejected by the Supreme Court in Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

Finally, to the extent plaintiffs allege that the conspiracy took place among the individual Westhampton defendants this claim is barred by the intra-corporate conspiracy doctrine. That doctrine provides that the agents, officers and employees of a municipal entity acting within the scope of their employment constitute a single entity and are, therefore, legally incapable of conspiring together. Broich v. Inc. Vill. of Southampton, 650 F. Supp. 2d 234, 246 (E.D.N.Y. 2009).

POINT VI

PLAINTIFFS CANNOT SUSTAIN A CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT

Plaintiffs fail to state a claim for tortious interference claim. Under New York law, the elements of a claim for tortious interference with contract are: "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom." (Emphasis added.) Sokol Holdings, Inc. v. BMB Munai, Inc., 726 F.Supp.2d 291, 304 (S.D.N.Y. 2010).

First, plaintiffs have not established the existence of a valid and binding contract with either LIPA or Verizon:

(a) The LIPA Agreement has already expired by its terms (see Art. VIII, § 2). In addition, plaintiffs have supplied no proof that they ever applied for the license necessary to toll said expiration date;

(b) Art. II, § 3 gives LIPA "the unlimited right in its sole discretion to refuse a license to the LICENSEE for any attachment" and Art. II, § 4 indicates that "the LICENSEE has no right to make any attachments to any pole of the LICENSOR until a license has been granted by LICENSOR … to the LICENSEE identifying each pole to which an attachment may be made".

(c) Art. III, § 2 of the LIPA Agreement makes clear that EEEA will not be entitled to a license to affix a lechi to a pole until it has applied to LIPA in writing, with the application delineating the location of the pole(s) involved and describing the attachment on each pole; and

(d) The Verizon Agreement is not even signed by Verizon. While plaintiffs may dismiss this as a mere technicality, the existence of a signed contract known to the defendant is a condition precedent to the establishment of a tortious interference claim. Sokol v. BMB Munai, Inc., supra, at 305.

Westhampton Beach defendants have never intentionally or unintentionally procured the breach of the LIPA or Verizon Agreements. As stated above, there is no enforceable agreement between the Plaintiffs and either of LIPA or Verizon. Even if there is such an agreement, no "breach" by LIPA or Verizon of either exists or has been alleged. Plaintiffs have not demonstrated that they have ever requested the issuance of a license from either Verizon or LIPA or that they have ever complied with the conditions precedent to an issuance of a license.

(See (a) Art. II, § 5, Art. III, § 3, Art. III, § 4 and Art. III, § 5 of the LIPA Agreement and (b) the section of the Verizon Agreement entitled "Construction of Eruv," which requires the submission to Verizon of a "sketch outlining in detail the boundaries of the ERUV and showing the localities encompassed and a list of poles by number and location, that will have staves attached".)

Without an enforceable contract, the claim, construed in the light most favorable to plaintiffs, can only be viewed as one for tortious interference with prospective contract rights. See Carvel Corporation v. Noonan, 3 N.Y.3d 182 (2004); NBT Bancorp Inc. v. Fleet/Norstar Fin. Group Inc., 87 N.Y.2d 614 (1996). Under these cases, a cause of action for tortious interference with a potential contract requires, inter alia, an allegation of wrongful behavior or wrongful means on the part of the defendant. "As a general rule the defendant's wrongful conduct must amount to a crime or an independent tort." Carvel, supra 3 N.Y.3d at 190. As more fully set forth above, Westhampton defendants have not taken any action with regard to plaintiffs' contracts, much less any wrongful, criminal, or otherwise tortious action.

Further, a claim for an injunction cannot lie in this instance because there is an adequate remedy at law. Winter Brothers Recycling Corp. v. Jet Sanitation Service Corp., 23 Misc.3d 1115(A), 885 N.Y.S.2d 714 (Sup. Ct. Nassau Cty 2009) citing, EdCia Corp. v. McCormack, 44 A.D.3d 991, 994 (2d Dep't 2007) (monetary damages for tortious interference are not difficult to calculate and, therefore, can be remedied at law).

Finally, plaintiffs' claim for an injunction against the alleged tortious interference cannot be converted to a claim for money damages, since plaintiffs have not filed a notice of claim pursuant to Gen. Mun. L. §§50-e(1)(a) and 50-i(1). Such a filing is a condition precedent to a

tortious interference claim against a village or its officials. Montano v. City of Watervliet, 47 A.D.3d 1106 (3d Dep't 2008).

CONCLUSION

For all the foregoing reasons, defendants request that this court grant their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), dismissing the complaint in its entirety, together with such other and further relief as this Court deems just, equitable, and proper.[7]

Dated: Westbury, New York
January 3, 2012

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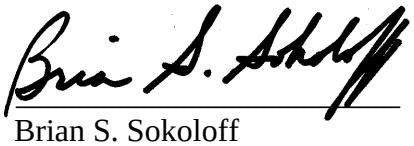

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[7] To the extent not set forth above, the Westhampton Beach defendants, as applicable, adopt the arguments set forth in the moving papers of the Quogue and Southampton defendants.